No. 13088

In the United States Court of Appeals for the Ninth Circuit

DONALD McKITTRICK AND BARBARA McKITTRICK,
APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR APPELLEE

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STATEMENT OF JURISDICTION

Appellants, defendants below, hereinafter referred to as defendants, appeal from a judgment entered May 11, 1951, by the United States District Court for the Northern District of California, Southern Division (Hon. Oliver J. Carter), in an action by the United States of America pursuant to Sections 205 (a) and 205 (c) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. A. App. 925 (a), 925 (c))[1] and Sections 205, 206 (b) and 206 (c) of the Housing and Rent Act of 1947, as amended (50 U. S. C. A. App. 1895, 1896 (b), 1896 (c)).[2] Such

[1] 50 U. S. C. A. App. Secs. 901 et seq., hereinafter referred to as the "Price Control Act," or "Act of 1942."

[2] 50 U. S. C. A. App. Secs. 1881 et seq., hereinafter referred to as the "Housing and Rent Act," or "Act of 1947."

judgment granted plaintiff an injunction, directed restitution by defendants of rent overcharges in the amount of $975 pursuant to Section 205 (a) of the Act of 1942 and Section 206 (b) of the Act of 1947, together with the sum of $225 as treble damages under Section 205 of the 1947 Act (R. 35–36). A motion for new trial filed May 21, 1951 (R. 37), was denied June 8, 1951 (R. 39), and on July 9, 1951, the defendants filed notice of appeal (R. 40). Jurisdiction of this Court is invoked pursuant to Section 1291 of the Judicial Code (28 U. S. C. 1291).

COUNTERSTATEMENT OF THE CASE

The appeal presents in effect but two questions—(1) whether the court below properly awarded restitution of the total rent overcharges found to have been received by defendants in violation of the 1942 and 1947 Acts (R. 33–34, 36), and (2) whether it was proper to also render judgment for treble the amount of overcharges received within one year prior to filing the complaint, which overcharges the trial court found as a fact to have been "willfully" demanded and collected (R. 32, 34, 36). As defendant's Statement of Facts (Brief, pp. 2–4) omits any definite reference to the pleadings and the findings and conclusions of the trial court, the following résumé of proceedings in the court below will be stated:

The complaint filed August 3, 1950, charged the defendants with violation of the Price Control and Housing and Rent Acts and Regulations issued there-

under [3] by collecting rents in excess of the legal maximum for certain controlled housing accommodations identified as 111 Oakmont Avenue, Piedmont, California, within the Alameda County Defense-Rental Area (R. 1–9). A schedule attached to the complaint named Bruce A. Wilson as the tenant alleged to have been overcharged, the rental accommodations occupied by him, the period of tenancy, the amount of rents collected, the legal maximum rent of $110 per month and the amounts of overcharges (R. 9). Such overcharges were alleged as a $300 "cash bonus paid in advance" to defendants on or about July 13, 1946, as a condition to rental of the accommodations for one year, and a monthly rental thereafter of $135 from July 14, 1947, to November 13, 1949 (R. 9). Such payments represented an overcharge over the stated period of $25 in excess of the lawful maximum monthly rent of $110 (R. 9). The complaint prayed injunction against further violations of the Housing and Rent Act, restitution of all overcharges unlawfully collected and judgment under Section 205 of the 1947 Act for three times the overcharges received within one year immediately preceding institution of the suit (R. 8).

Defendants by their answer admitted being landlords of and having rented the accommodations referred to in the complaint, but denied violation of either the Price Control or Housing and Rent Acts

[3] Rent Regulation for Housing (10 F. R. 13528) and Controlled Housing Rent Regulation (12 F. R. 4331 and 14 F. R. 1571).

(R. 10, 12). Defendants did not deny the alleged maximum legal rent of $110 per month for the accommodations. The answer asserted in substance as matters of defense that no action existed under the 1942 Act after July 1, 1947, when the 1947 Act became effective, that no cause of action existed for any alleged overcharges received prior to one year before institution of suit on August 3, 1950, and that Section 205 of the 1947 Act, as amended, was not retroactive to permit any action for alleged violations thereof prior to the effective date of amendment on April 1, 1949 (R. 10, 11, 13). The answer further claimed that between the months of July 1946 and November 1949, the tenant, Wilson, had damaged the rented premises and furniture and fixtures therein in excess of the amount sought to be recovered by plaintiff and because of this alleged offset any cause of action for treble damages as set forth in count III of the complaint (R. 6) was "paid and discharged" (R. 14).

In response to Request for Admissions served by plaintiff under Federal Procedural Rule 36 (R. 16), defendants admitted that for the period alleged in the complaint (R. 9), the tenant Wilson was in possession of the accommodations involved and that no action had been brought by the tenant against defendants to recover the overcharges alleged (R. 17, 18). In answer to interrogatories also served by plaintiff pursuant to Federal Procedural Rule 33, defendants stated in substance the following facts: On or about July 13, 1946, the defendants rented the Oakmont Avenue premises to Bruce A. Wilson and his wife,

Beatrice Wilson, by written "Lease" a copy of which was attached to their answers (R. 22, 27). The term thereby provided was for one year, from July 13, 1946, to July 13, 1947, at the total rent of $1,320, payable monthly (R. 28). At the time said lease was executed, defendants in addition to the Oakmont Avenue premises, owned a home in Walnut Creek, California, which "was not subject to rental control" (R. 23). For such Walnut Creek property defendants had been offered a rental of $150 per month, which they had determined to accept, and live in the Oakmont Avenue property (R. 23).

"Under these circumstances" and "to induce" defendants "to forego their right to occupy" the Oakmont Avenue home for one year, and "to occupy and not to rent their home in Walnut Creek, and to permit" the Wilsons "to enter into possession" of the Oakmont Avenue property "but not as rent" for said premises, the Wilsons "paid defendants the sum of $300" (R. 23). Upon expiration of the lease July 13, 1947, the same was renewed by written endorsement thereon for an additional one-year period to July 13, 1948 (R. 22). Such renewal agreement was signed by defendants, Donald McKittrick and Barbara McKittrick, and by the tenants, Bruce Wilson and his wife, Beatrice Wilson (R. 22). For the period from July 13, 1947, to July 13, 1948, the Wilsons paid to defendants $110 per month rent and the sum of $300 at the rate of $25 per month as an inducement to defendants "to forego possession of their own house for another year" and to continue occupancy of their

Walnut Creek home and not rent it for that period (R. 24–25).

On or about July 13, 1948, defendants and the Wilsons orally agreed to continue the same rental agreement for "an additional period" to July 13, 1949 (R. 22, 25). On or about July 13, 1949, by oral agreement of the same parties the stated rental arrangement was continued until other housing accommodations then being prepared for the Wilsons could be completed and ready for occupancy (R. 22–23, 25–26). Under such agreement the Wilsons "would pay defendants' rent at the rate of $110 per month and an additional sum of $25 for foregoing defendants' right of occupancy" of the Oakmont Avenue premises (R. 26). All of which sums were paid as agreed (R. 26).

Proceedings Upon Trial and Findings of Fact and Conclusions of Law by the Trial Court

The case came to trial December 28, 1950 (R. 45). Following a statement by the attorney for plaintiff (R. 45–48), defendants' counsel in addressing the court (R. 49) stated that the "only question" involved was "the equitable defense against restitution" (R. 54). The same counsel further observed as to the "three months overcharge" of $75, that there were presented in effect the further questions—"first," whether or not such sum "should be trebled," and "secondly," whether anything was due by reason of the defendants' claim that the tenants had "damaged the landlord" and were indebted to the landlord "in excess of any overcharge in the rent" (R. 54).

Plaintiff produced as witnesses the Rent Attorney of the Alameda County Defense-Rental Area, Cyril M. Saroyan (R. 59), and the tenants, Bruce A. Wilson (R. 87, 255) and his wife, Beatrice Wilson (R. 124, 219). For the defendants both Donald McKittrick (R. 140), and his wife, Barbara McKittrick (R. 177) testified. After considering this testimony and exhibits produced in evidence by the respective parties the trial court by Findings of Fact determined (R. 30):

The housing accommodations were originally registered by the defendant, Barbara McKittrick, on December 6, 1944, at the monthly rental of $150 which was reduced to $110 per month by order of the Area Rent Director issued April 3, 1945 (Finding of Fact 2, R. 31).

On or about July 13, 1946, defendants leased the accommodations to Bruce A. Wilson for one year at a total rent of $1,320, and as a condition thereof, "although not mentioned in the lease," required the tenant to pay an additional $300 in cash representing an excess of $25 per month over the maximum prescribed rent (Findings 3 and 4, R. 31–32).

Upon expiration of said lease in July 1947, and continuing to about November 13, 1949, the defendants demanded and received from the tenant monthly rentals of $135 for the accommodations, which totaled $700 in excess of the prescribed rent of $110 per month over the stated period (Finding of Fact 5, R. 32).

Following the tenant's discovery of the prescribed rent later in November 1949 he made written request

upon defendants for restitution of the total overcharges which the defendants failed to make either in whole or in part, and no action has been instituted by the tenant on account of such overcharges (Findings 6 and 7, R. 32).

Three of the monthly overcharges of $25 each for which damages were sought occurred within one year of the filing of the complaint and such three overcharges were "willfully demanded, accepted, and received" by the defendants within the same period (Findings 8 and 9, R. 32).

Between July 13, 1946, and November 13, 1949, the tenants did not willfully and wantonly damage the premises nor the furniture and furnishings of the accommodations involved in the amount of $1,225, or any sum whatever (Finding of Fact 10, R. 32–33).

Among other conclusions of law the court below determined (R. 33):

1. * * *.

2. * * *.

Under the Acts and Regulations involved the maximum legal rent for the accommodations at all times other than from July 13, 1946, to July 25, 1946, was $110 per month and the defendants by demanding and receiving the overcharges specified in the foregoing Findings of Fact, "did knowingly violate the Acts and Regulations" (Conclusions 3 and 4, R. 33).

The defendants had failed to satisfactorily show why the equitable power of the court should not be exercised, or to satisfactorily assume the burden of proving that acceptance of the overcharges within the year immediately preceding the filing of the com-

plaint was not willful nor the result of failure to take practicable precautions against such occurrence (Conclusion of Law 5, R. 33).

The plaintiff on account of said violations was therefore entitled to recover treble damages from the defendants in the total amount of $225 (three times the total overcharges of $75 received within one year prior to institution of the action), and to an injunction against further violations by the defendants as prayed in the complaint (Conclusions 6 and 7, R. 34).

Plaintiff is entitled to a judgment directing the defendants to refund to the plaintiff on behalf of the tenant Wilson, or in the alternative to plaintiff on its own behalf, in the event the said tenant cannot be located, the aforesaid overcharges in the total amount of $975 (Conclusion of Law 8, R. 34).

The defendants were entitled to take nothing by reason of their claim of setoff for damages (Conclusion of Law 9, R. 34).

Upon the foregoing findings and conclusions the court below on May 11, 1951, entered final judgment which in effect ordered and decreed (1) that the defendants be enjoined from demanding or receiving rents in excess of the lawful maximum established pursuant to the Act of 1947; (2) that the defendants make restitution to plaintiff on behalf of the tenant Wilson for overcharges in the sum of $975; and (3) that the plaintiff recover from defendants the sum of $225 "as treble damages for the wilful violations" of the Act and Regulations by reason of the overcharges involved (R. 35–36). On May 21, 1951, de-

fendants' motion for a new trial was denied (R. 37, 39) and on July 9, 1951, the defendants from the said judgment entered their appeal (R. 40).

ARGUMENT

I

The record presents no basis for reversal of the judgment appealed from

The brief for defendant asserts only two alleged errors by the court below to the following effect (pp. 6–7):

1. The trial court erred in finding that it was incumbent upon defendants to prove that they should not restore the rental overcharges, instead of requiring plaintiff to prove "that the equities demanded that money paid by a mere volunteer (from the legal standpoint) should be restored to him" (p. 6).

2. That "portion of the judgment" was erroneous which ordered defendants to pay in effect a total of four times the overcharges collected over the three months' period within a year prior to institution of the action (pp. 6–7).

It is submitted that both of the foregoing contentions are clearly without merit.

1. Contrary to the contention of defendants, restitution was properly awarded for the entire rental overcharges

Defendants by the first alleged error (Brief, p. 4) misconstrue entirely the trial court's conclusion of law No. 5 as relating to the exercise of equitable jurisdiction (R. 33). Contrary to the contention urged, the lower court did not find that it was incumbent

upon defendants to prove that they should not make restitution of the $300 bonus and the additional monthly overcharges of "$25 more than the ceiling rental" which the Brief (p. 6), admits were collected. With respect to burden of proof, the trial court held only in effect that defendants had not shown that such admitted overcharges were not willful nor the result of failure to take practicable precautions against their occurrence (R. 33). This burden was expressly imposed upon defendants by Sections 205 (e) of the 1942 Act and 205 of the Act of 1947 (*Infra,* p. 16). As will be hereafter shown (*Infra,* p. 16), such action for treble damages is entirely separate and distinct from the equitable right of restitution provided by Sections 205 (a) of the Act of 1942 and 206 (b) of the 1947 Act.

The principle is clearly established by the decisions of this Court and of other appellate jurisdictions that the award of restitution is primarily in the public interest and to enforce compliance with the Acts of Congress to prevent inflation. *Woods* v. *McCord,* 175 F. 2d 919 (C. A. 9); *Woods* v. *Davis,* 185 F. 2d 567 (C. A. 9); *Woods* v. *Richman,* 174 F. 2d 614, 615 (C. A. 9); *Ebeling* v. *Woods,* 175 F. 2d 242, 245 (C. A. 8); *Woods* v. *Bomboy,* 179 F. 2d 565, 566 (C. A. 3); *Creedon* v. *Randolph,* 165 F. 2d 918 (C. A. 5). As this Court observed in *Woods* v. *McCord, supra,* "the action for restitution is not solely for the redress of private wrongs," but "is primarily concerned with the vindication of public rights" (at p. 922). And in the more recent decision of *Woods* v. *Davis, supra,* where such relief was sought in an action under both the Price Control and

Housing and Rent Acts, the Court said (185 F. 2d, p. 569):

> "The authority of the courts, under § 205 (a) of the 1942 Act and § 206 (b) of the Act of 1947, to order restitution of excess rentals is settled by *Porter* v. *Warner Holding Co.,* 328 U. S. 395, 66 S. Ct. 1086, 90 L. Ed. 1332, and by later decisions in this and other circuits. Consult *Woods* v. *Richman,* 9 Cir., 174 F. 2d 614. The object of employing this equitable remedy is to check inflationary trends and to effectuate generally the policy of Congress. * * *
>
> The law is no respecter of persons, and we think the best way to educate those contemplating evasion of it is to demonstrate that violation will in every case result in judgment against the wrongdoer. * * *"

It follows that there is no merit to the contention of defendants (Brief, p. 5), that the court below "failed to find as to the equities concerning restitution."

Equally untenable is the further argument (Brief, p. 6) that the trial court "could have found" from the evidence that Wilson, the tenant, "induced McKittrick to enter into the tenancy" and "voluntarily paid" the overcharge of $25 per month to induce defendants not to take possession of the Oakmont Avenue premises.[4] The rule is clearly established that

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[4] Factual statements at p. 3 of Defendant's Brief are controverted in the testimony. The tenant Wilson testified that he did not offer to pay $135 monthly rental for the premises and did not offer to give the defendants $300 in advance (R. 226) as stated by the defendant McKittrick (R. 151). The same witness fur-

the voluntary payment of price or rental overcharges constitutes no defense to an action for violation of the 1942 or 1947 Acts. *Porter* v. *Crawford & Doherty Foundry Co.,* 154 F. 2d 431, 434 (C. A. 9); *United States* v. *Grubl,* 186 F. 2d 470 (C. A. 9); *Bray* v. *Peck,* 190 F. 2d 998 (C. A. 9); *Ebeling* v. *Woods,* 175 F. 2d 242, 245 (C. A. 8).

In *Porter* v. *Crawford & Doherty Foundry Co., supra,* which was an action by the Price Administrator for injunction and treble damages under Sections 205 (a) and 205 (e) of the former Price Control Act, this Court held that Congress intended the imposition of statutory damages on the price violator "as a deterrent to the violator" even though the buyer by making the purchase "may have aided the seller in violating the law" (154 F. 2d, p. 434). In *Ebeling* v. *Woods, supra,* the defendant appealed from a judgment which ordered restitution to the tenant of a rental overcharge collected by the landlord as a "bonus" in violation of the 1942 Act. In answer to the contention that restitution should be denied for the reason that "it was as wrong for the tenant to pay the $500 bonus as it was for the landlord to accept it," the Court said (175 F. 2d, p. 245):

> "Under § 50 U. S. C. A. Appendix, § 904 (a), the duty to avoid overcharges under the Act is the responsibility of the landlord and not the tenant. The landlord alone, because of his superior position generally in the housing-

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ther testified that he gave the check for the stated amount because "I was asked for it," and upon certain representations by the defendants as to approval by O. P. A. of an advance in rental which he believed (R. 227, 229).

> shortage situation was made the offender under the Act. Congress regarded a tenant, who paid more than the authorized rental for a housing accommodation, as having committed no wrong. Cf. *Zwang & Bowles* v. *A. & P. Food Stores,* 181 Misc. 375, 46 N. Y. S. 2d 747. Whether the excess rent was willingly or unwillingly paid, the statute prohibited the landlord from accepting it and provided for its recovery from him."

In *United States* v. *Grubl, supra,* this Court gave effect to the same principle in considering an action under both the 1942 and 1947 Acts for rental overcharges and praying the same relief of injunction, restitution and statutory damages as in the case at bar. The defendant there sought to assert substantially the same defense as urged in the present appeal—that the "excess amounts" of rent collected by the landlord "were paid to him pursuant to an independent contract with his renters and not as rent" (186 F. 2d, p. 471). It was further contended that the tenants had given to the landlord a "full and complete release" for any overcharge claim (at p. 472). This Court held that such "voluntary agreement" was "not a valid defense" to the action, but was "contrary to the express provisions" of both the 1942 and 1947 Acts and the Rent Regulations applicable.[5] The Court further observed (at pp. 472–473) that "Where a statutory proscription is

[5] The Court here referred to Section 4 (a) of the 1942 Act, Section 206 (a) of the Act of 1947, and Rent Regulations for Rooming Houses issued pursuant to the 1947 Act (12 F. R. 4302; 13 F. R. 1873).

placed upon one party he may not plead the collusion of a third party for violation of the statutory edict." (Citing *Popplewell* v. *Stevenson,* 176 F. 2d 362 (C. A. 10); *National Labor Relations Board* v. *American Potash & Chemical Corp.,* 118 F. 2d 630, 631 (C. A. 9); *Ebeling* v. *Woods, supra;* and *Porter* v. *Crawford & Doherty Foundry Co., supra.*)

2. The record presents no equities in favor of defendants upon the basis of which the trial court should have denied restitution for the rental overcharges admittedly collected

The defendants (Brief, p. 14) "admit that the judgment of restitution is within the jurisdictional power" of the court below and the restitution order "is valid," provided that plaintiff sustained the burden of proving that equity under all the circumstances of the case demanded the exercise of the court's discretion. Defendants further contend that the trial court erroneously assumed it was mandatory to order restitution whether the plaintiff sustained such burden. There is no basis to support this contention and the defendants point out no equitable aspects upon which the award of restitution should be denied.

In contending that the burden of proof was upon the United States, defendants (Brief, pp. 7–9) cite Section 205 of the Housing and Rent Act and assert that any action for recovery of overcharges paid before August 3, 1949, or one year prior to commencement of the action on August 3, 1950, "is barred." Such contention is entirely misplaced and is clearly without supporting basis. In *Woods* v. *Richman,* 174 F. 2d, pp. 615–616, and *Woods* v. *McCord,* 175

F. 2d, pp. 921–922, *supra,* this Court gave effect to the established principle that the limitation of one year in which to sue for the treble damages there provided has no application to the separate and distinct equitable relief of restitution under Section 205 (a) of the 1942 Act and Section 206 (b) of the Act of 1947. See too, *Woods* v. *Gochnour,* 177 F. 2d 964 (C. A. 9); *Brooks* v. *Woods,* 181 F. 2d 716 (C. A. 9); *Ebeling* v. *Woods, supra* (175 F. 2d at p. 244); *Woods* v. *Wayne,* 177 F. 2d 559, 560 (C. A. 4); *Warner Holding Co.* v. *Creedon,* 166 F. 2d 119 (C. A. 8), after remand by the Supreme Court in *Porter* v. *Warner Holding Co.,* 328 U. S. 395.

Aside from Section 205 of the 1947 Act having no application to the award of restitution, the burden was upon defendants under such section as well as Section 205 (e) of the 1942 Act both to plead and prove freedom from willfulness, as well as the taking of practicable precautions to avoid the occurrence of violations, as a defense to liability in treble damages for the admitted overcharges (*Bowles* v. *Glick Bros. Lumber Co.,* 146 F. 2d 566, 571–572 (C. A. 9); *Fontes* v. *Porter,* 156 F. 2d 956, 958 (C. A. 9); *Bowles* v. *Franceschini,* 145 F. 2d 501, 514 (C. A. 1); *McRae* v. *Creedon,* 162 F. 2d 989, 992 (C. A. 10). See too, as applying the stated rule in actions for statutory damages under the 1947 Act, *Small* v. *Schultz,* 173 F. 2d 940, 943 (C. A. 7); *Woods* v. *Pielet,* 187 F. 2d 453 (C. A. 7); *Beatty* v. *United States,* 191 F. 2d 317, 319 (C. A. 8).

The defendants in their answer (R. 10–14) did not plead either freedom from willfulness or the tak-

ing of practicable precautions to avoid the overcharges. At trial in the court below such overcharges were in effect admitted (R. 54), and the same clearly appeared from defendants' answers to plaintiffs' interrogatories (R. 23–26, *supra* pp. 4–6).

The trial court by findings of fact determined (R. 32) that the three monthly overcharges of $25 each within one year of filing the complaint on August 3, 1950 (R. 9), were "willfully" demanded and collected, and as a conclusion of law the court held (R. 33) that by demanding and receiving the earlier overcharges as specified in the factual findings (R. 31–32), the defendants "did knowingly violate the Acts and regulations."

The defendants do not question the foregoing finding of willfulness and the receipt of the overcharges set forth in the complaint is admitted (Brief, p. 5). Contrary to the contention of defendants (Brief, p. 14), the trial court did not assume that it was "mandatory on him" to order restitution, but expressly recognized that to the award of such relief "equitable defenses" might be interposed (R. 55–56). Upon the claim of defendants that the tenants damaged the rented premises and furnishings thereof during their occupancy (R. 14), the trial court found as a fact that such damage did not occur in "any sum whatsoever" (R. 33). This factual finding the defendants likewise do not challenge. It follows that there is no basis to contend that by the award of restitution the discretion of the trial court was abused.

3. Contrary to the contention of defendants, the trial court did not err in rendering judgment for treble damages in addition to the award of restitution

By findings of fact which are not questioned, the trial court determined that defendants collected the following rental overcharges:

> The cash sum of $300 on or about July 13, 1946, which was an excess of $25 per month for one year over the maximum legal rent of $110 per month (Finding of Fact 4, R. 31–32).
>
> Monthly rentals of $135 per month from July 13, 1947, to November 13, 1949, representing overcharges of $25 for 28 months and amounting to $700 (Finding of Fact 5, R. 32).

The total of the foregoing overcharges is $1,000.

The trial court further found that three of the monthly overcharges occurred within the one year period between August 3, 1949, and August 3, 1950, when the complaint was filed (R. 9); also that such overcharges totaling $75 were "willfully" demanded and received (Findings of Fact 8 and 9, R. 32).

The judgment of the trial court awarded restitution in the amount of $975[6] and treble damages of $225

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[6] Nine hundred and seventy-five dollars represented the total overcharges of $1,000 diminished by $25 of the $300 paid to the defendants by the tenant upon execution of the lease July 13, 1946 (R. 92). An amended order for judgment entered April 25, 1951, noted that the Price Control Act of 1942 as extended did not become effective until July 25, 1946, and that the $25 payment for the first month of the lease should be deducted from the balance of the $300 payment to be restored. This order though designated by defendants in the appeal record (R. 43), and included in the documents transmitted to this Court (R. 238), does not appear in the printed record, and is set forth in Appendix of the present brief (*infra*, p. 29).

for the overcharges "wilfully" collected during the stated one-year period (R. 36).

Contrary to the contention of defendants (Brief, p. 16), there was no error in such judgment for statutory damages in addition to the award of restitution. In *Woods* v. *Witzke,* 174 F. 2d 855 (C. A. 6), it was held in an action under the former Price Control Act that judgment for "treble damages" covering excess rentals "collected within the year preceding the filing of the complaint" should be granted in addition to restitution of the total overcharges, the Court observing that the two remedies are entirely separate and are not irreconcilable and "that there is no incongruity between the award of statutory damages and restitution" (at p. 857).

The *Witzke* decision was recently followed and applied by the Court of Appeals for the Eighth Circuit in *United States* v. *Ziomek,* 191 F. 2d 818 (C. A. 8), respecting the recovery of treble damages in addition to the award of restitution. In the *Ziomek* case an action was brought under Sections 205 and 206 (b) of the 1947 Act, and the same relief of damages, restitution and injunction was prayed as in the case now before the Court. The trial court in granting only injunctive relief and restitution and denying statutory damages, there held that under the Housing and Rent Act a judgment for statutory damages could not be entered simultaneously with the award of restitution and an injunction because they were incompatible remedies (191 F. 2d at p. 820). In reversing such judgment the reviewing court (at p. 821) gave effect to the established principle that the

equitable relief of restitution under Section 206 (b) of the Act, "is consistent with and differs greatly from the damages" which may be awarded under Section 205 (citing *Porter* v. *Warner Holding Co., supra,* 328 U. S. at p. 402). The Court further observed (p. 821) that while the granting of restitution rested "wholly in the equitable discretion of the Court," that an award of damages "is not discretionary but is required by the terms of the statute" (citing among many other decisions, the decision of this Court in *Mattox* v. *United States,* 187 F. 2d 406 (C. A. 9), cert. denied, 72 S. C. 37). Respecting judgment for multiple damages in addition to restitution the Court said (191 F. 2d at p. 821):

> The award of treble damages in a willful case will not deprive the court of its discretion to grant restitution unless the amount awarded would under all the circumstances constitute an abuse of discretion.

The reasoning of the decisions by the Sixth and Eighth Circuit Courts of Appeals in the *Witzke* and *Ziomek* cases is consistent with the reasoning of this Court in *Mattox* v. *United States, supra,* to the extent that this Court also recognized that "Restitution is an equitable remedy resorted to under Sec. 206 (b) [of the 1947 Act] independently of the award of damages" (at p. 408). True this Court in the *Mattox* case had no occasion to reach the precise problem presented here because the trial court had found (at p. 409) that the defendants' conduct there was free from willfulness and that practicable precautions had been taken, and this Court felt that the finding

of the court below in this regard found support in the record.

In the judgment now being considered, the court below as a finding of fact determined that the total overcharges of $75 occurring within the one year prior to filing the complaint were "wilfully" demanded and collected (R. 32), and this finding is not challenged here. It was therefore mandatory under Section 205 of the 1947 Act to award damages in treble the stated amount of overcharges not barred by the statute of limitations, or $225 as the trial court did (R. 36). The court below in exercise of sound discretion also awarded restitution for the total overcharges of $975 (R. 36). In no respect have the defendants established that by such determination the discretion of the trial court was so manifestly abused that it should be disturbed (*Bowles* v. *Huff,* 146 F. 2d 428 (C. A. 9)). If anything, it would appear from the facts present in this case, *supra,* page 5, that the lower court acted well within the equitable discretion in awarding restitution in adition to statutory damages. It follows that there was no error in the award of both treble damages and restitution.

Contrary to appellants' contention (Brief, p. 16), *Orenstein* v. *United States,* 191 F. 2d 184, 191, is not a square authority opposed to the decisions reached by the Court of Appeals for the Sixth and Eighth Circuits. True, by way of dicta the First Circuit Court of Appeals adopted a different view respecting the award of both restitution and treble damages from the determination of the Sixth and Eighth Circuits in the *Witzke* and *Ziomek* decisions when it

declared that Congress intended the limit of liability to be no more than treble the amount of the established overcharges. But as observed in the *Orenstein* case (p. 188), the trial court there did not determine that the rental overcharges were willful, and unlike the complaint in the case now being considered (R. 8), the prayer for relief in the *Orenstein* case expressly stated that in the event restitution be awarded, that the judgment for damages "be reduced by the amount of such restitution" (at p. 192). Since restitution in the *Orenstein* case exceeded the single damages recoverable under the facts of the case, by the very terms of the prayer of the complaint in that case, no statutory damages whatever could be awarded. In the case at bar the prayers are different in that it is expressly prayed that judgment be awarded for both restitution and treble damages for overcharges received within one year of the commencement of the action (R. 7–8). Also, in the case at bar, the trial court found that the overcharges within the one year before institution of the action were "wilful" (R. 32). Consistent with the prevailing law, the proof in the case and the prayers of the complaint, the court awarded treble damages, as being mandatory under the express provisions of the 1947 Act (*infra,* p. 26), and restitution as an exercise of discretion. It is submitted that the principles as determined in the *Witzke* and *Ziomek* cases fully sustain the judgment rendered.[7]

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[7] As amended in 1951, the Housing and Rent Act provides the same limited discretion in granting statutory damages which courts were authorized to exercise under Section 205 (e) of the

CONCLUSION

The judgment appealed from presents no error and should be affirmed.

All of which is respectfully submitted.

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1942 Act (*infra*, p. 24). In a willful case, the court may now award more than single and up to treble the overcharge; and it will no longer be mandatory to award treble the overcharge. In the willful case the court may also award double statutory damages to the Government where it has awarded restitution to tenants as was done and approved in *Cobleigh* v. *Woods*, 172 F. 2d 167 (C. A. 1), which considered Section 205 (e) of the 1942 Act. It is doubtful whether this amendment will apply to violations occurring prior to the date of the amended Act because the prior Act created *substantive* rights which may not be affected retroactively, particularly by an amendment to the statute which is not expressly retroactive by its terms. (See p. 28 Appendix, for amendment.)

APPENDIX

Emergency Price Control Act of 1942, as Amended—50 U. S. C. A. App. 925 (a) and 925 (e)

"Sec. 205 (a). Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond."

"Sec. 205 (e). If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In any action under this subsection, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine:

Provided, however, That such amount shall be the amount of the overcharge or overcharges if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation.

For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. * * *"

APPENDIX

Housing and Rent Act of 1947, as Amended—50 U. S. C. A. App. II and III, Sec. 1895 and 96 (b)

"Sec. 206 (b). Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act, or any regulation or order issued thereunder, the United States may make application to any Federal, State, or Territorial court of competent jurisdiction for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond."

"Sec. 205. Any person who demands, accepts, or receives any payment of rent in excess of the maximum rent prescribed under section 204 shall be liable to the person from whom he demands, accepts, or receives such payment (or shall be liable to the United States as hereinafter provided), for reasonable attorney's fees and costs as determined by the court, plus liquidated damages in the amounts of (1) $50, or (2) three times the amount by which the payment or payments demanded, accepted, or received exceed the maximum rent which could lawfully be demanded, accepted, or received, whichever in either case may be the greater amount; *Provided,* That the amount of such liquidated damages shall be the amount of the

overcharge or overcharges if the defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. Suit to recover such amount may be brought in any Federal, State, or Territorial court of competent jurisdiction within one year after the date of such violation: *Provided,* That if the person from whom such payment is demanded, accepted, or received either fails to institute an action under this section within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the United States may institute such action within such one-year period. If such action is instituted, the person from whom such payment is demanded, accepted, or received shall thereafter be barred from bringing an action for the same violation or violations. For the purpose of determining the amount of liquidated damages to be awarded to the plaintiff in an action brought under this section, all violations alleged in such action which were committed by the defendant with respect to the plaintiff prior to the bringing of action shall be deemed to constitute one violation, and the amount demanded, accepted, or received in connection with such one violation shall be deemed to be the aggregate amount demanded, accepted, or received in connection with all violations. A judgment in an action under this section shall be a bar to a recovery under this section in any other action against the same defendant on account of any violation with respect to the same person prior to the institution of the action in which such judgment was rendered."

APPENDIX

Section 205, Housing and Rent Act of 1947, as amended in 1951 (Pub. L. 96, 82d Cong., 1st Sess. (1951)):

> "SEC. 205. (a) Any person who demands, accepts, receives, or retains any payment of rent in excess of the maximum rent prescribed under the provisions of this Act, or any regulation, order, or requirement thereunder, shall be liable to the person from whom such payment is demanded, accepted, received, or retained (or shall be liable to the United States as hereinafter provided) for reasonable attorney's fees and costs as determined by the court, plus liquidated damages in the amounts of (1) $50, or (2) not more than three times the amount by which the payment or payments demanded, accepted, received or retained exceed the maximum rent which could lawfully be demanded, accepted, received, or retained, as the court in its discretion may determine, whichever in either case may be the greater amount: *Provided,* That the amount of such liquidated damages shall be the amount of the overcharge or overcharges if the defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation."

APPENDIX

"Original Filed Apr. 26, 1951, Clerk, U. S. Dist. Ct., San Francisco"

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 29940

UNITED STATES OF AMERICA, PLAINTIFF

v.

DONALD McKITTRICK AND BARBARA McKITTRICK, DEFENDANTS

Amended Order for Judgment

ORDERED:

That the Order for Judgment in the above-entitled action heretofore made and entered on the 12th day of February 1951 be amended and modified as follows:

Upon findings of fact and conclusions of law, judgment will enter against the defendants for restitution to tenant Bruce A. Wilson of overcharges in rent totaling $975, and in favor of the plaintiff and against the defendants in the sum of $225 damages, and for an injunction in accordance with paragraph 1 of the prayer of the complaint on file herein, and that plaintiff recover its cost of suit herein.

It appears from the evidence that the tenant, Bruce A. Wilson, paid to the defendants the sum of $300 on the 11th day of July 1946 with the intention that

said sum of $300 should be an advance payment of $25 per month for one year on account of the rent to be paid for the premises involved in this action. It further appears that this payment was made at the time when there were no rent-control laws in effect. The Price Control Extension Act (50 U. S. C. A., App. 901a note) became effective on July 25, 1946, and the Emergency Price Control Act expired on June 30, 1946. It is therefore the opinion of this Court that the $25 monthly payment for the first month of the lease, which commenced on July 13, 1946, was not in violation of any rent-control law or regulation, but it is the opinion of this Court that the balance of the $300, which by the parties was intended to apply on each month's rent at the rate of $25 per month, must be restored to the tenant as having been demanded, accepted, and received in violation of the policy of the law.

Judgment will be entered acordingly.

Dated: April 25, 1951.

OLIVER J. CARTER,
United States District Judge.

U. S. GOVERNMENT PRINTING OFFICE: 1952